83-249

NO. 83-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILMA EVERITT, ET AL.,
Petitioners

v.

THE CITY OF MARSHALL, TEXAS, ET AL.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court's denial of plantiffs' motion for class certification, in view of the overwhelming evidence of disparate treatment of blacks in: (a) termination and discharge rate, (b) turn-over rate, (c) departmental hiring rate, (d) departmental employment rate, (e) hiring by job category, (f) employment by job category, and (g) payment rate of blacks, constitute an abuse of discretion according to the standards set out by the Federal Rules of Civil Procedure thus entitling petitioners to reversal rather than affirmation of the trial court's decision?

2. Does the Fifth Circuit Court of Appeal's reasoning that denial of class certification was proper, in light of the trial Court's holding that Ms. Everitt was discharged for cause, conflict with this Court's mandate in *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980)?

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PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

The Petitioner, Wilma Everitt, individually and in her representative capacity as representative of the class of past, present, and prospective black employees of the City of Marshall, Texas, respectfully submits this Application for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court's denial of plantiffs' motion for class certification, in view of the overwhelming evidence of disparate treatment of blacks in: (a) termination and discharge rate, (b) turn-over rate, (c) departmental hiring rate, (d) departmental employment rate, (e) hiring by job category, (f) employment by job category, and (g) payment rate of blacks, constitute an abuse of discretion according to the standards set out by the Federal Rules of Civil Procedure thus entitling petitioners to reversal rather than affirmation of the trial court's decision?

2. Does the Fifth Circuit Court of Appeal's reasoning that denial of class certification was proper, in light of the trial Court's holding that Ms. Everitt was discharged for cause, conflict with this Court's mandate in *United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980)?

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OPINIONS BELOW

The order of the United States District Court for the Eastern District of Texas denying plaintiffs' first and second motions for class certification is reproduced in Appendixes A and B, respectively, to the petition for Writ of Certiorari. The Opinion of the panel of the Court of Appeals affirming the dismissal of petitioner's individual claim and the denial of class certification is reported at 703 F.2d 207 (5th Cir. 1983). In that Opinion, it was held that even if denial of certification was erroneous, the intervening decision as to plaintiff's individual claim is fatal to her claim on appeal that the trial court's denial of certification was an abuse of discretion.

JURISDICTION OF THIS COURT

Judgment was entered by the Court of Appeals for the Fifth Circuit on April 22, 1983. This Court's jurisdiction is invoked under 21 U.S.C. § 1254(1) because the opinion of the Court of Appeals for the Fifth Circuit conflicts with prior decisions of this Court.

STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE

This case involves application of Rule 23 of the Federal Rules of Civil Procedure to litigation under Title VII of the Civil Rights Act of 1964, as it was extended by the Equal Employment Opportunity Act of 1972 to cover state and local employees, and 42 U.S.C. §§ 1981, 1983. Rule 23 states in pertinent part:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a).

The time for application of the aforementioned rule is set out as follows:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended, before the decision on the merits. FED. R. CIV. P. 23 (c)(1).

Title VII states in pertinent part that:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e(2) (1964).

Plaintiff and members of her class also receive protection under the following laws as set out in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. 42 U.S.C. § 1981 (1977).

and;

> Every person who, under color of any statute, ordinance, regulation, custom or usage, or any State or Territory or the District of Columbia, subjects, or

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983 (1979).

STATEMENT OF THE CASE

Petitioner filed this case as a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* alleging that the City of Marshall, Texas, discriminated in the compensation, promotion, and discharge in hiring of black employees, while countenancing the maintenance of a racially discriminatory work environment and retaliating against black employees. Petitioner moved for an order certifying the action as a class action, which was denied by the District Court after an evidentiary hearing. The District Court reasoned that questions of law or fact relating to plaintiff, a discharged civil service employee, might not be common to non-civil service employees.

Plaintiff's second motion for class certification was denied without a hearing. Subsequently, the District Court tried petitioner's individual claim. Although the District Court found plaintiff had proved a prima facie case of racial discrimination, and that members of the police department had engaged in the use of contemptuous racial language, the Court held that plaintiff's discharge was due to dereliction of duty and not motivated by discriminatory animus.

Plaintiff appealed and a panel of the Fifth Circuit affirmed the trial court's decision in both the individual and class claims. The Court held that petitioner had neither claims typical of the members of the class nor an adequate common interest or nexus with them.

REASONS FOR GRANTING THE PETITION

The Court of Appeals Decision Insulates Class Certification Denials from Review and Conflicts with Prior Opinions of this Court

The Court of Appeals affirmed the trial court's decision to deny class certification based on Ms. Everitt's failure to succeed in proving her individual case. The Court held that "... with regard to Ms. Everitt, the trial on the merits of her individual claim resulted in a determination that she herself 'was not a victim of discrimination. Even if she would have appeared to be an appropriate representative on (the date of the District Court's denial of class certification) she is not now an appropriate representative .... This defect is fatal' to her claim on appeal that the District Court's denial of certification was an abuse of its discretion." *Everitt v. City of Marshall*, 703 F.2d 207 (1983). This was error.

Failure to review denial from the proper perspective deprived petitioner of her right to review under the standards imposed by the Federal Rules of Civil Procedure, which require that the plaintiff be an appropriate class representative at the time she requests certification, without reference to the ultimate outcome of her individual case. *Huff v. N.D. Cass Company*, 485 F.2d 710 (5th Cir. 1973). Affirmation of the trial court's refusal to certify conflicts with this Court's decision in *Geraghty*, "... that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied. The proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Article III values are not undermined." *United States Parole Commission v. Geraghty*, 445 U.S. 388 at 404.

The perspective from which a review of denial of class

certification is conducted is crucial. Refusing to review the failure of a trial court to certify a class at the time of the motion for certification places an impermissible burden on the class representative by requiring success on her individual claim before the Court of Appeals will even consider whether there was an abuse of discretion in the denial of her class claim. *Huff*, 485 F.2d 710. Such perspective effectively insulates the denial of class certification from review.

Under this ruling, a district court may deny a motion for class certification and try the named plaintiff's individual case knowing that the denial of class certification will not be reviewed unless the plaintiff wins the individual case and then appeals the class case. Therefore, the court's ruling in *Everitt* gives a trial court incentive to deny individual cases in order to avoid troublesome class actions.

Plaintiff demonstrated her appropriateness as class representative when she motioned for class certification as she pled a prima facie case. Where, as in the instant case, plaintiffs' overwhelming and undisputed statistical analysis makes clear that the disparate: (1) termination and discharge rate, (2) turn-over rate, (3) departmental hiring rate, (4) departmental employment rate, (5) hiring by job category, (6) employment by job category, and (7) pay rate of black employees was not likely to have been due to the operation of random factors not associated with race, and where plaintiff satisfies the other federal rule requirements, when she makes her motion for class certification, she and the class she represents are entitled to certification.

As demonstrated by her statistical evidence, plaintiff meets the federal rule requirement of numerosity. During the years 1977 through 1980, well over four hundred (400) blacks were employed by the City of Marshall, including a significant turnover of two hundred thirty-two (232) black employees of

which eighty-four (84) were terminated or discharged. She meets the requirement of commonality as employment descrimination on the basis of race was clearly demonstrated by the conclusive statistical evidence and shown not to be isolated to a single department in the city, but pervasive throughout all of the city departments. She demonstrates typicality as plaintiff's claim is founded upon discrimination based on the terms and conditions of employment on the basis of race in all departments of the City of Marshall. The Appellate Court's opinion note that, ". . . *Everitt* presents an impressive argument that the asserted racially discriminatory practices were common to both civil service and unclassified employees." *Everitt*, 703 F.2d at 210. Refusal to certify plaintiffs' class was clearly error.

This Court has recently addressed class certification in *General Telephone Company of Southwest v. Falcon*. 457 U.S. 147. The Court of Appeals class certification was reversed for reasons that do not present themselves in the instant case. While the holding in *Falcon* may appear to support the denial of certification in *Everitt*, the cases are easily distinguishable upon their facts.

In *Falcon* the trial Court certified a class without conducting an evidentiary hearing. In *Everitt* the statistical evidence of class discrimination presented on the Motion for Certification was overwhelming and uncontroverted.

The plaintiff in *Falcon* was unable to show "(1) that this discriminatory treatment is typical of Petitioner's promotion practices, (2) that Petitioners' promotion practices are motivated by a policy of ethnic discrimination that pervades Petitioner's . . . division, or that this policy of ethnic discrimination is reflected in Petitioners' other employment practices, . . . *Falcon*, 457 U.S. 147.

Falcon suggests the success of a class-based discrimination

suit depends on an analysis of statistics concerning the employer's hiring patterns. Where the unchallenged evidence shows that minority employees were hired in the numbers greater than their percentage of the labor force, claims of class-based discrimination may not be supported. *Falcon*, 457 U.S. 147 (dissenting opinion). The record in *Everitt* supports an opposite conclusion. Even though these findings were made, the holding in *Falcon* still rejects the evaluation of class certification by hindsight, 457 U.S. 151. *Falcon* supports the proposition that the perspective for evaluating the propriety of class certification is from the time of the motion for certification. In contrast to the evidence in *Falcon*, the statistics in *Everitt* are unequivocal. In light of the evidence presented in *Everitt*, the rule in *Falcon* would not preclude class certification.

Geraghty was a challenge by prisoners to the federal parole guidelines. The trial court denied the named plaintiff's Motion for Class Certification. He was released from prison, mooting his individual case. The plaintiff petitioned for review of the denial of class certification.

The Court of Appeals, ruling that the litigation was not moot, reversed the judgment of the District Court and remanded the case for further proceedings. The Appellate Court held that an erroneous denial of a class certification should not moot the issues. This Court addressed the Art. III controversies as follows:

> Mr. Justice POWELL, in his dissent, advocates a rigidly formalistic approach to Art. III, at 1216-1217, and suggests that our decision today is the Court's first departure from the formalistic view. *Post*, at 1218-1220. We agree that the issue at hand is one of first impression and thus, in that narrow sense, is "unprecedented," *post*, at 1220. We do not believe, however, that the decision constitutes a redefinition of Art. III principles or a "significant departure[e]," *post*, at 1215, from "carefully considered" precedents, *post*, at 1220.

The erosion of the strict, formalistic perception of Art. III was begun well before today's decision. For example, the protestations of the dissent are strikingly reminiscent of Mr. Justice HARLAN's dissent in *Flast v. Cohen*, 392 U.S. 83, 116, 88 S.Ct. 1942, 1960, 20 L.Ed.2d 947, in 1968. Mr. Justice HARLAN hailed the taxpayer-standing rule pronounced in that case as a "new doctrine" resting "on premises that do not withstand analysis." *Id.*, at 117, 88 S.Ct., at 1961. He felt that the problems presented by taxpayer standing "involve nothing less than the proper functioning of the federal courts, and so run to the roots of our constitutional system." *Id.*, at 116, 88 S.Ct., at 1961. The taxpayers were thought to complain as "private attorneys-general," and "[t]he interests they represent, and the rights they espouse, are bereft of any personal or proprietary coloration." *Id.*, at 119, 88 S.Ct. at 1962. Such taxpayer actions "are and must be . . 'public actions' brought to vindicate public rights." *Id.*, at 120, 88 S.Ct. at 1963.

Nothwithstanding the taxpayers' lack of a formalistic "personal stake," even Mr. Justice HARLAN felt that the case should be held nonjusticiable on purely prudential grounds. His interpretation of the cases led him to conclude that "it is . . . clear that [plaintiffs in a public action] as such are not *constitutionally* excluded from the federal courts." *Ibid.* (emphasis in original).

It is not somewhat ironic that Mr. Justice POWELL, who now seeks to explain *United Airlines, Inc. v. McDonald, supra*, as a straight-forward application of settled doctrine, *post*, at 1219, expressed in his dissent in *McDonald*, 432 U.S., at 396, 97 S.Ct., at 2471, the view that the holding rested on a fundamental misconception about the mootness of an uncertified class action after settlement of the named plaintiffs' claims? He stated:

"Pervading the Court's opinion is the assumption that the class action somehow continued after the District Court denied class status. But that assumption is supported neither by the text nor by the history of Rule 23.

To the contrary, . . . the denial of class status converts the litigation to an ordinary nonclass action." *Id.*, at 399, 97 S.Ct., at 2472.

The dissent went on to say:

"[Petitioner] argues with great force that, as a result of the settlement of their individual claims, the named plaintiffs 'could no longer appeal the denial of class' status that had occurred years earlier . . . . Although this question has not been decided by this Court, the answer on principle is clear. The settlement of an individual claim typically moots any issues associated with it. . . . This case is sharply distinguishable from cases such as *Sosna v. Iowa* . . . and *Franks v. Bowman Transp. Co.* . . . where we allowed named plaintiffs whose individual claims were moot to continue to represent their classes. In those cases, the District Courts previously had certified the classes, thus giving them 'a legal status separate from the interests[s] asserted by [the named plaintiffs].' *Sosna v. Iowa, supra,* 419 U.S. at 399, 95 S.Ct. at 557. This case presents precisely the opposite situation: The prior denial of class status had extinguished any representative capacity." *Id.*, at 400, 97 S.Ct., at 2473 (footnote omitted).

Thus, the assumption thought to be "[p]ervading the Court's opinion" in *McDonald*, and so vigorously attacked by the dissent there, is now relegated to "gratuitous" "dictum," at 1219. Mr. Justice POWELL, who finds the situation presented in the case at hand "fundamentally different" from that in *Sosna and Franks*, at 1217, also found the facts of *McDonald* "sharply distinguishable" from those previous cases. 432 U.S., at 400, 97 S.Ct. at 2472.

We do not recite these cases for the purpose of showing that our result is mandated by the precedents. We concede that the prior cases may be said to be somewhat

confusing, and that some, perhaps, are irreconcilable with others. Our point is that the strict, formalistic view of Art. III jurisprudence, while perhaps the starting point of all inquiry, is riddled with exceptions. And, in creating each exception, the Court has looked to practicalities and prudential considerations. The resulting doctrine can be characterized, aptly, as "flexible"; it has been developed, not irresponsibly, but "with some care," at 1215, including the present case.

The dissent is correct that once exceptions are made to the formalistic interpretation of Art. III, principled distinctions and bright lines become more difficult to draw. We do not attempt to predict how far down the road the Court eventually will go toward premising jurisdiction "upon the bare existence of a sharply presented issue in a concrete and vigorously argued case," at 1222. *Geraghty*, 100 S.Ct. at 1213 n.11.

When a class is certified it acquires a legal status separate from the interest asserted by the named plaintiff. *Sosna v. Iowa*, 419 U.S. 396 (1975). Thereafter, a case or controversy may continue to exist between the class as an entity and the defendant, and the merits of the class claim may then be adjudicated. *Geraghty*, 445 U.S. 388 (1980).

CONCLUSION

The Court of Appeals affirmed the denial of class certification based on the named plaintiff's appropriateness as class representative at the time she lost her individual case on the merits, rather than her appropriateness as class representative at the time she moved for class certification. This was error.

Affirmation is error, because the Court of Appeals incorrectly equates the named plaintiff's nexus with the pro-

posed class with the merits of her personal claim, and fails to consider whether she retained a personal stake in the outcome of the litigation after the dismissal of her individual case. By summarily affirming the trial court's decision, the Appellate Court has fashioned a rule which both effectively insulates denials of class certification from review and provides incentive to dismiss individual cases in Title VII litigation.

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

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By: _____
ROBYN ELIZABETH RAY

CERTIFICATE OF SERVICE

I, Robyn Elizabeth Ray, hereby certify that a copy of the foregoing Petitioners' Application for Writ of Certiorari has been mailed certified return receipt requested to the Honorable Jason R. Searcy, 107½ W. Austin Street, P. O. Box 1386, Marshall, Texas 75670, on this the day of July, 1983.

_____
ROBYN ELIZABETH RAY

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MASHALL DIVISION

WILMA EVERITT, INDIVIDUALLY AND IN BEHALF OF ALL OTHERS SIMILARLY SITUATED PERSONS	)	
vs.	)	NO. M-79-219-CA
CITY OF MARSHALL, ET AL	)	

ORDER

This is an employment discrimination suit brought by Wilma Everitt, a black female, against the City of Marshall, Texas, and various City officials, arising out of Ms. Everitt's nine month tenure as a dispatcher for the City of Marshall Police Department. Following her indefinite suspension by the Police Department for alleged dereliction of duty, Ms. Everitt appealed to the Civil Service Commission of the City of Marshall which affirmed the decision of the Police Department. She then instituted an action in state district court challenging the decision of the Civil Service Commission. *See Firemen's and Policemen's Civil Service Commission v. Hamman*, 404 S.W. 2d 308, 311 (Tex. 1966) (Plaintiff entitled to a trial de novo governed by a substantial evidence review)

In addition to pursuing her civil service remedies, Ms. Everitt filed a charge of discrimination with the Equal Employment Opportunity Commission on February 2,

1979. She alleged that she had been subjected to racial insults on September 6, 1978, when a white patrolman asked her if she had "chased any 'Niggers' lately." Ms. Everitt also alleged that she was discharged on September 23, 1978, as a result of her objections to the racial insults. Her original charge of discrimination filed with the EEOC (based solely on race) and the amendment to her charge (adding an allegation of sex discrimination) present only allegations of individual discrimination. Ms. Everitt's EEOC charge did not complain of any class wide discrimination nor could the charge be interpreted as alleging or challenging a pattern or practice of racial discrimination on the part of the City. Neither party has presented any evidence relating to the scope of the investigation conducted by the EEOC.

For matters relevant to the issue now under consideration, she alleges that she received a right to sue letter from the Department of Justice on January 7, 1980, and filed the complaint under which she is now proceeding on March 17, 1980. In her complaint, Ms. Everitt alleges that the Police Department discriminated against her and other members of the class she seeks to represent on the basis of race and sex, in violation of 42 U.S.C. §§ 1981,[1] 1983, and 2000e, *et seq.* More specifically she complains of the following employment practices and polices of the City: Discrimination in recruiting, hiring, and job assignments; unlawful terminations; allowing black employees to be harassed; retaliatory termination of minority employees who challenge discriminatory practices; and "reliance almost exclusively on reports and recommendations of other white officers, almost all of whom have been white males, in making decisions with respect to the employment status of black males and females, including, but not limited to, hiring and termination."

1 Section 1981 of Title 42 will not support a claim based on sex discrimination *Runyon v. McCrary*, 427 U.S. 160 (1976)

In addition to her individual claims, she alleges that she represents two classes of persons:

a. All black persons who are presently employed, have been employed, have made application to be employed, or who may in the future be employed or make application to be employed in the police department of Defendant the City of Marshall, Texas and who have been and continue to be or might be adversely affected by the practices and policies complained of herein; and

b. All female persons who are presently employees, have been employed, have made application to be employed, or who may in the future be employed or make application to be employed in the police department of Defendant the City of Marshall, Texas and who have been and continue to be or might be adversely affected by the practices and policies complained of herein.

In her motion for declaration of a class action and at the subsequent hearing on the motion, the claims of the class relating to sex discrimination have not been advanced. Accordingly, the gender-based class allegations need not be addressed. As quoted above, Ms. Everitt stated in her pleadings that she seeks to represent past, present and future black employees of the City of Marshall Police Department. Following extensive discovery, Plaintiff now argues that she should be allowed to represent a class of employees eccompassing all employees of the City of Marshall, including non-civil service employees. Indeed, at the class action certification hearing, almost all of the Plaintiff's evidence was directed at establishing a class of employees encompassing all of the persons who are or have been employed by the City of Marshall in all of its departments.

JURISDICTION OVER THE CLASS CLAIMS?

The Defendants question this court's jurisdiction over the class action claims in this lawsuit. It is their contention that the charges filed with the EEOC do not contain any allegations that might lead to a finding of class wide discrimination and that any class action claims in this suit are barred because they are not within the scope of the EEOC charge. There is some authority on this point. *See Fellows v. Universal Restaurants, Inc.*, Civil Action No. CA3-80-1328-F, _____F.Supp._____(N.D.Tex. June 16, 1981) (50 L.W. 2016); *EEOC v. Mallinckroot*, 22 FEP CASES 311 (E.D. Mo. 1980).

In *Fellows*, the EEOC charge filed by the plaintiff was lacking any class allegations and the EEOC investigation did not uncover any unlawful employment practice other than the claims that pertained to the plaintiff. Judge Porter concluded that to allow the plaintiff to maintain a class action suit in federal court, when there is no indication of class related unlawful employment practices in the administrative record would "sanction the 'witch hunt' condemned in Mallinckrodt." *Fellows, supra* at page 9. The *Fellows* decision traces the development of the relationship that exists between a charge of discrimination filed with the EEOC and the jurisdiction of a federal court to entertain a subsequent Title VII suit that arises out of the original charge. *Id.* at 4. Relying on *Falcon v. General Telephone Co.*, 626 F.2d 369 (5th Cir. 1980), vacated on other grounds, _____U.S._____, 101 S.Ct. 170 (1981), parts I, II, IV, V, and VI of Original Opinion reinstated_____F.2d _____, (5th Cir. June 24, 1981) (Slip Op. 8949); *Gamble v. Birmingham Southern Railroad Co.*, 514 F.2d 678 (5th Cir. 1975), and *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970), the district court concluded that it did not have jurisdiction over Title VII class action claims that

were not presented to the EEOC nor investigated by the EEOC and found to have some merit.

While I agree with the rationale and the result in *Fellows*, I am reluctant to decide the jurisdictional issue in this case in view of the limited evidence in the record relating to the scope of the investigation conducted by the administrative authorities. Further, the exact question presented in *Fellows* has yet to be responded to by the Fifth Circuit. Although not specifically articulated by the Plaintiff, it is assumed that the class action claims based on 42 U.S.C. §§ 1981, 1983, are still being advocated and those claims would not be jurisdictionally barred under *Fellows*. *Hill v. American Airlines, Inc.*, 479 F.2d 1057, 1060 (5th Cir. 1973).

RULE 23(a): PREREQUISITES TO A CLASS ACTION

The following provisions of Rule 23 of the Federal Rules of Civil Procedure must be met:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> . . . .
>
> (2) the party opposing the class has acted or refused to

act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; . . .

An analysis of the Rule 23(a) prerequisites as they apply to this case necessitates an early resolution of the following issue: Should this court allow a person that was formerly employed under the provisions of a state civil service statute to represent the claims of employees not subject to the state civil service statute in a class action alleging across the board discrimination? No member of the class of employees not subject to civil service is a party to this action.

During her tenure as a dispatcher for the City of Marshall Police Department, all policemen and firemen employed by the City were subject to the laws of the State of Texas providing for the creation of a Firemen's and Policemen's Civil Service in all Texas cities having at least 10,000 inhabitants. TEX. REV. CIV. STAT. ANN. art. 1269m (Vernon 1963 & Supp. 1980-81) (hereinafter art. 1269m). Section 16a of art. 1269m states that the purpose of the statute "is to secure to the cities affected thereby efficient police and fire departments, composed of capable personnel, free from political influence, and with permanent tenure of employment as public servants." Article 1269m controls and regulates the hiring, promotion, supervision, demotion and discipline of policemen and firemen in cities subject to the Act. Pursuant to this statute, the City of Marshall has adopted rules and regulations for the administration of Civil Service for Firemen and Policemen in the City of Marshall. *See* City of Marshall Ordinance 0-64-5 (March 26, 1964), as amended by Ordinance 0-79-29 (July 26, 1979).

The statute and regulations provide a very detailed framework under which most of the essential employment policies of the Police Department are controlled. Persons employed

by the City of Marshall in any of its 13 other departments are not subject to the proscriptions of the Civil Service laws and regulations. This distinction is significant for the purposes of determining whether the Plaintiff should be allowed to maintain this suit as a class action. While this Court is bound to accept the principle that her claims of racial discrimination might be typical of those of all black employees of the City of Marshall, *see Falcon v. General Telephone Co.*, supra, 626 F.2d at 375 (5th Circuit still approves "across the board" attacks on discrimination), it does not necessarily follow that adjudication of her claim will involve questions of law or fact common to the claims asserted on behalf of the non-civil service employees. Rule 23(a)(2), Fed.R.Civ.P.

For example, a person seeking a position of employment with the Police Department must complete an application for employment, must take a competitive examination administered by the Civil Service Commission, must pass a physical examination and is subject to other age and physical requirements as set by the Commission. Art. 1269m, §§9,13[2]. Section 10 of art. 1269m provides that the persons having the highest grade on the eligibility list shall be appointed to a vacant position unless there is a valid reason why the person holding the next highest grade should be appointed. Thus, the testing process is an integral part of the process of filling vacancies in the Marshall Police Department. Validation of employment tests, especially in the field of civil service employees, presents many unique and complex questions. *See Guardians Association of New York City P.D. v. Civil Service Commission*, 633 F.2d 232 (2nd Cir. 1980); *Guardians Association of New York City P.D. v. Civil Ser-*

2 The Fifth Circuit recognized the significance of dissimilar hiring procedures when it affirmed the district court's decision to limit class certification to persons employed at a particular location. *Falcon v. General Telephone Co.*, supra, 626 F.2d at 376.

vice Commission, 630 F.2d 79 (2nd Cir. 1980).

Moreover, once a person is employed by the Marshall Police Department, any subsequent promotions (§§14,14A), suspensions (§§15, 17, 18, 20), or demotions (§19) are controlled by statute.

These and other factors persuade the court to limit the class of persons that the Plaintiff should be allowed to represent to only those persons who are employed by the Marshall Police or Fire Department, persons who have been terminated from those departments, and persons that applied for employment in those departments.

An examination of the relevant class of black employees of the City of Marshall subject to the Civil Service laws of Texas reveals that during the years 1977, 1978, 1979, and 1980, a maximum of eight blacks were employed by the City in the police and fire protection categories. There was no evidence introducted to indicate the number of blacks, if any, that filed applications to take examinations for Fireman or Policeman in accordance with §1 of the City of Marshall's Rules and Regulations for Civil Service for Firemen and Policemen, as amended. In this Court's opinion, the Plaintiff has failed to demonstrate that the class of black applicants and employees is so numerous that joinder of all members is impracticable. Rule 23(a)(1), Fed. R. Civ. P.

Because of the findings above that two of the prerequisites to a class action have not been satisfied, it need not be determined whether the Plaintiff will fairly and adequately protect the interests of the class.

In accordance with the foregoing opinion, it is ORDERED that the Plaintiff's Motion for Declaration of a Class Action be and hereby is DENIED.

SIGNED this 14th day of September, 1981.

/s/ William M. Steger
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WILMA EVERITT, et al	)	
	)	
VS.	)	NO. M-79-219-CA
	)	
THE CITY OF MARSHALL, et al	)	

ORDER DENYING PLAINTIFF'S SECOND MOTION FOR CLASS CERTIFICATION

Came on to be heard Plaintiff's Second Motion for Class Certification and after consideration of the same, it is ORDERED that Plaintiff's Second Motion for Class Certification be and hereby is DENIED.

SIGNED THIS 17 day of November, 1981.

/s/ WILLIAM M. STEGER
United States District Judge

NO. 83-249

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILMA EVERITT, ET AL.,
Petitioners

v.

THE CITY OF MARSHALL, TEXAS, ET AL.,
Respondent

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUPPLEMENTAL APPENDIX

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 82-2134

Wilma EVERITT, On Behalf of Herself
and All Others Similarly Situated,
Plaintiff-Appellant,

v.

The CITY OF MARSHALL, et al.,
Defendants-Appellees.

Appeal From The United States District Court
For The Eastern District of Texas

Entered April 22, 1983

Before WISDOM, RUBIN and TATE, Circuit Judges.

TATE, Circuit Judge:

The plaintiff Ms. Everitt, a black woman who was discharged from her position with the city police department, appeals from the dismissal of her action against the City of Marshall, Texas, and various of its officials. Her suit is based upon alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as well as of 42 U.S.C. §§ 1981, 1983. By her appeal, she contends: (1) that the district court erred in dismissing her individual claim that her discharge was racially motivated; and (2) that it also erred in denying her motions for class certification to represent all black past, present, and future employees of the city allegedly subjected to across-the-board racial discrimination.

We affirm, finding (1) that the district court's dismissal of Ms. Everitt's individual claim is founded on factual findings that are not clearly erroneous, and (2) that its denial of class certification is not shown to be an abuse of discretion, since in view of the district court's non-erroneous dismissal of her individual claim under the circumstances presented by this record, Ms. Everitt's claim of discrimination lacks nexus with that of the proposed class, and she is not a member of the class of discriminatees she seeks to represent. Fed.R.Civ.P. 23(a).

1. *The Plaintiff's Individual Claim*

The plaintiff Everitt was employed by the city as a police dispatcher from December 1977 until September 1978. She advanced from probationary status to become a permanent civil service employee as a result of extremely favorable work-evaluations. She was discharged on September 25, 1978, because of dereliction of duty. Her dereliction was her averring there were no outstanding warrants when police officers called in for a warrant check, although in fact there were — the deduction being that she failed to check for them but simply responded quickly that there were none. This discovery occurred because other officers — having suspected her prior negligence in such check — called in during September 21 and 22 for warrant checks in instances where there *were* known to be outstanding warrants, but still receiving her assurance that her check for them was negative. The district court found as a fact that she had failed to check for warrants when requested to do so by police officers in the field, that the failure to check for warrants could endanger the lives of these officers, and that she was discharged for this dereliction of duty.

In contending that the alleged dereliction was a pretext and that the other (white) police officers had manufactured the incident (inferentially, by pulling outstanding warrants

so that Ms. Everitt could not find them when she checked for them upon their requests), Ms. Everitt contends that the conduct of the white police officers was in retaliation for her objections to racially discriminatory and racially derogatory comments to which she had been subjected by her non-supervisory fellow white officers (of which she had not complained to the chief of police prior to her discharge). The district court did not "condone the contemptuous racial statements by the officers", but held that Ms. Everitt had "failed to prove that her termination was motivated by or resulted from discriminatory animus."

Although, ultimately, the issue is whether her own testimony or that of the other officers is more credible. We cannot say that the district court's findings of fact based upon its credibility evaluations are clearly erroneous, Fed.R.Civ.P. 52(a), so as to admit of reversal. Thus, the employer having produced a legitimate non-discriminatory reason for her discharge, the plaintiff Everitt did not meet her burden of persuasion that the advanced reason for her discharge was pretextual and "that a discriminatory reason more likely motivated the employer" or "that the employer's proferred [sic] explanation is unworthy of credence." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095, 67 L.Ed.2d 207 (1981).

We therefore affirm the district court's dismissal of Ms. Everitt's individual claim.

2. *Denial of Class Certification*

The district court denied Ms. Everitt's motion for class certification after an evidentiary hearing, some six months before the trial on the merits of her individual claim. The evidence at the certification hearing consisted of a statistical expert's testimony analyzing black employment by the city and tending to show across-the-board discrimination, the

testimony of the city's personnel director showing employment practices (including documents pertaining to employment regulations applicable to the city), and the plaintiff Everitt's own stipulated testimony as to the alleged racially discriminatory practices to which she herself had been subjected.

The district court's denial of class certification was based upon its finding that the discriminatory practices to which Ms. Everitt claimed she had been subjected lacked the requisite commonality and numerosity required by Fed.R.Civ.P. 23(a)[1] with the class she purported to represent of all black past, present, and future employees of the city. The district court reached this conclusion upon its analysis that Ms. Everitt was under the firemen's and policemen's civil service regulations and thus subject to different hiring, promotion, supervision, demotion, and discipline regulations than the unclassified employees in the other thirteen municipal departments, with whom she therefore lacked commonality, Rule 23(a)(2); and that there were only eight black employees in the civil-service-tenured municipal fire and police departments, so that she had failed to demonstrate that the class of black applicants and employees was so numerous

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1 Fed.R.Civ.P. 23 provides, in pertinent part:

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued, as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

that joinder of all members was impracticable, Rule 23(a)(1).

The plaintiff Everitt presents an impressive argument that the asserted racially discriminatory practices were common to both civil service and unclassified employees. However, for reasons to be stated, we conclude that, on the record before us as a whole, Ms. Everitt is not a proper class representative because she neither has claims typical of the members of the class nor has an adequate common interest or nexus with them.

(a) *Relevant Legal Principles*

The following principles are relevant to our affirmance of the denial of class certification:

"An individual seeking to maintain a class action under Title VII must meet 'the prerequisites of numerosity, commonality, typicality, and adequacy of representation' specified in Rule 23(a). [Citation omitted.] These requirements effectively 'limit the class claims to those fairly encompassed by the plaintiff's claim.'" *General Telephone Company of the Southwest v. Falcon*, — U.S. —, —, 102 S.Ct. 2364, 2370, 72 L.Ed.2d 740 (1982). "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as class members." *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 1896, 52 L.Ed.2d 453 (1977).

Further, "[w]here no class has been certified, . . . [on appellate review] the decision whether the named plaintiffs should represent a class is appropriately made on the full record, including the facts developed at the trial of the plaintiff's individual claims." *Rodriguez, supra*, 431 U.S. at 406 n. 12, 97 S.Ct. at 1898 n. 12. Thus, where a plaintiff alleging employment discrimination appeals the dismissal of both the individual claim and the denial of class certification, the affirmance of the dismissal of the individual claim may

be "fatal" to the class certification claim because of the employee's "lack of nexus with, and membership in, the class." *Satterwhite v. City of Greenville*, 578 F.2d 987, 992 (5th Cir. 1978) (en banc). When an employee's individual claim of injury resulting from employment discrimination is dismissed, such employee "is not a member of the class of discriminatees [the employee] seeks to represent" and "has never suffered any legally cognizable injury either in common with [the proposed] class or otherwise." *Id.*

(b) *The Claims of Class Discrimination*

In addition to her claim for individual relief, Ms. Everitt brought suit on behalf of all past, present, and future employees of all fifteen municipal departments of the City of Marshall. The class aspect of the action was to obtain declaratory, injunctive, or other appropriate relief to end eight specified racially discriminatory practices.[2]

Of these, the certification hearing reveals that Ms. Everitt herself had not even arguably been subjected to discrimination in recruiting, hiring, promotion, job assignment, or com-

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2. The stipulation by pretrial order specifies these to be:
   1. Compensating black employees at lower salaries than similarly situated white employees;
   2. Promoting black employees on a less frequent basis than similarly situated white employees;
   3. Discharging black employees for reasons which would not result in discharge of similarly situated white employees;
   4. Countenancing the maintenance of a racially discriminatory work environment by refusing or failing to take appropriate disciplinary action with respect to racial slurs occurring in the work place;
   5. Retaliating against minority employees who challenged defendants' discriminatory practices by terminating their employment;
   6. Relying almost exclusively upon reports and recommendations of white employees in making decisions with respect to the employment status of black employees, including, but not being limited to hiring, promotions, and terminations;
   7. Discriminatory hiring to various job positions by race; and
   8. Assigning jobs on a racially discriminatory basis.

pensation. (In fact, as stipulated, she "received the same pay and performed the same duties as other dispatchers in the City of Marshall Police Department with the same or similar longevity or seniority.") Since Ms. Everitt herself "'could have suffered no injury as a result of the[se] discriminatory practices, [she was], therefore, simply not eligible to represent a class of persons who did allegedly suffer [such] injury.'" *Falcon, supra,* — U.S. at —, 102 S.Ct. at 2370. Further, her stipulated testimony at the certification hearing (as well as her EEOC complaint introduced thereat) would indicate only that she herself had been subjected to racial slurs by her white police colleagues and does not show that other black employees were similarly harassed.[3] She thus did not by this issue raise a question of law or fact common to the class. Fed.R.Civ.P. 23(a)(2).

Ms. Everitt's remaining complaints were of allegedly racially discriminatory practices with regard to the discharge of black employees, including retaliation against them by terminating their employment if they challenged racially discriminatory practices. With regard to Ms. Everitt, the trial

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[3] At the trial on the merits of Ms. Everitt's individual claim some months later, two black police officers testified that they had heard racial slurs or jokes told by white officers (although not addressed to them personally). The chief of police denied that he knew of these racial slurs; he testified that, upon learning of Ms. Everitt's complaint subsequent to her discharge, he had emphasized at a supervisors' meeting that no racial slurs would be tolerated in the work environment, and that he had heard no subsequent complaint. Even assuming that this merit-testimony (some months subsequent to the proper denial of certification on the issue on the showing made at the certification hearing) might have warranted reconsideration of the denial, the plaintiff ("with the primary responsibility for pressing a class action claim", *Satterwhite, supra,* 578 F.2d at 999) did not move to "modify [the certification order] in the light of subsequent developments in the litigation", *Falcon, supra,* — U.S. at — & n. 16, 102 S.Ct. 2372 & n. 16, so as to certify Ms. Everitt as representative of at least a class of city employees subjected to racial slurs and a racially-biased work environment.

on the merits of her individual claim resulted in a determination that she herself "was not a victim of discrimination. Even if she would have appeared to be an appropriate representative on [the date of the district court's denial of class certification], she is not now an appropriate representative . . . . This defect is fatal" to her claim on appeal that the district court's denial of certification was an abuse of its discretion. *Satterwhite*, *supra*, 578 F.2d at 993.

As we stated in similar circumstances in *Camper v. Calumet Petrochemicals, Inc.*, 584 F.2d 70, 71-72 (5th Cir.1978):

> [The plaintiff former employee] is not a member of the class of discriminatees he seeks to represent. He has failed to prove that he suffered any injury, either as a member of the class or as an individual. He is no longer an employee of [the defendant employer] and is not subject to the alleged discriminatory practices; he is a past employee but this court has affirmed that his discharge was not discriminatory. Thus, he is not eligible to represent class members who allegedly were injured by racial discrimination [in their discharge].

CONCLUSION

Accordingly, we AFFIRM the judgment of the district court that dismissed the plaintiff's suit, finding that the denial of her claim for individual relief was based upon factual determinations that are not clearly erroneous, and that the denial of class certification was not in the light of the full record an abuse of discretion.

AFFIRMED.

No. 83-249

In The
Supreme Court of the United States
October Term, 1983

WILMA EVERITT, ET AL.,
Petitioners,
vs.
THE CITY OF MARSHALL, TEXAS, ET AL.,
Respondents.

On Petition For Writ of Certiorari To the United States Court of Appeals For the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion in denying class certification?

2. Does the holding of the Fifth Circuit Court of Appeals conflict with the ruling in *United States Parole Commission v. Geraghty*, 445 U. S. 388, 63 L. Ed. 2d 479, 100 S. Ct. 1202 (1980).

LIST OF PARTIES

1. Wilma Everitt, Petitioner;

2. All black past, present and future employees of The City of Marshall, Texas, potential class members;

3. The City of Marshall, Texas, Respondent;

4. William Burns, Respondent;

5. Pete McCarty, Respondent;

6. Ray Jackson, Respondent;

7. S. A. Birmingham, Respondent;

8. Wayne Courtney, Respondent;

9. Glenn Listen, Respondent;

10. Cecil Wallace, Respondent.

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No. 83-249

In The

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WILMA EVERITT, ET AL.,

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vs.

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On Petition For Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

The Respondents, The City of Marshall, et al., respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit.

CITATIONS TO OPINIONS BELOW

Petitioner accurately states the status of the opinions below in her Petition for Writ of Certiorari.

JURISDICTION

Petitioner accurately states her allegations of jurisdiction with the exception that the citation to the appropriate statute is in error apparently due to a typographical mistake and states jurisdiction is evoked under 21 U. S. C. Section 1254 when in fact the citation should be 28 U. S. C. Section 1254. Respondent denies that this Court has jurisdiction.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

References to the appropriate legal precedents are correctly stated in Petitioner's Petition for Writ of Certiorari with the exception of an omission of a reference to Rules 17 through 23 of the U. S. Supreme Court Rules, set forth in full in Appendix A to this Brief.

STATEMENT OF THE CASE

Petitioner's statement of the case in her Petition for Writ of Certiorari is substantially correct.

SUMMARY OF ARGUMENT

1. This Court has no jurisdiction to consider the Petition for Writ of Certiorari since it was not timely filed.

2. There are no circumstances creating a need for a review by this Court of the lower court's use of its discretion and in fact such Court did not abuse its discretion in denying class certification.

3. The decision of the Fifth Circuit Court of Appeals relating to whether or not Petitioner is a proper class representative does not conflict with the ruling in *United States Parole Commission v. Geraghty, id.*, which deals with a jurisdictional question.

ARGUMENT

Petition Is Not Timely Filed

A Petition for Writ of Certiorari to review the judgment of a Federal Court of Appeals must be filed within sixty (60) days after entry of such judgment. Rule 20(1), U. S. Supreme Court Rules. It is clear that the time for filing a Petition for Writ of Certiorari runs from the date the judgment or decree is rendered. Rule 20(4), U. S. Supreme Court Rules. The Clerk of the Supreme Court is required to refuse to receive any Petition for Writ of Certiorari which is filed in an untimely manner. Rule 20(3), U. S. Supreme Court Rules. The judgment sought to be reviewed by Petitioner herein of the United States Court of Appeals, Fifth Circuit, was rendered on April

22, 1983. Petition for Writ of Certiorari was filed with the Clerk of the United States Supreme Court by Petitioner's attorneys on July 21, 1983. Therefore, the Petition was filed more than sixty (60) days after the judgment was rendered and is not timely. As a result this Court has no jurisdiction pursuant to its own rules to consider the Petition.

No Need For Review

Ordinarily, the application by a Federal District Court of the Rules of Civil Procedure, when affirmed by a Court of Appeals, will not be reviewed by the Supreme Court on Certiorari. This is particularly true when the question is one that concerns the judgment of a District Judge in relation to a particular set of facts. *Appalachian Power Company v. American Institute of Certified Public Accountants*, 80 S. Ct. 16, 4 L. Ed. 2d 30 (1959). There are no extraordinary circumstances which would give rise to the need of review by the Supreme Court in this matter. The Trial Court considered the testimony and documentary evidence tendered by both Petitioner and Respondents and determined the evidence proffered by Respondents was more credible. The Fifth Circuit Court of Appeals reviewed that evidence and upheld the decision of the Trial Court. There was clear, convincing and credible evidence to support the findings of the Trial Court and no unusual circumstances giving rise to extraordinary review by this Court.

No Conflict

Petitioner urges the Court in her Petition for Writ of Certiorari that the instant case conflicts with the holding of *United States Parole Commission v. Geraghty, id.* The *Geraghty* decision is not on point with the ruling in this case. *Geraghty* deals with questions of jurisdiction

and standing to appeal the denial of class certification under Article III of the United States Constitution. There is no jurisdictional or standing question involved in this action but merely a question of whether Petitioner constitutes a proper class representative. The Supreme Court held in *Geraghty*:

> "Our holding is limited to the appeal of the denial of class certification motion. A named Plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified. (Citations omitted). If, on appeal it is determined that class certification properly was denied, the claim on the merits must be dismissed as moot.
>
> Our conclusion that the controversy here is not moot does not automatically establish that the named Plaintiff is entitled to continue litigating the interests of the class. It does shift the focus of examination from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interest of the class'. (Citations omitted). We hold only that a case or controversy still exists. The question of who is to represent the class is a separate issue."

The question of who is to represent a class is not a question of whether a case or controversy exists under the Constitution. It is a matter of the application of the Federal Rules of Civil Procedure to the factual circumstances existing. The applicable rule is derived from *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U. S. 395, 52 L. Ed. 2d 453, 97 S. Ct. 1891 (1977). In *Rodriguez, supra*, the putative class was not certified and at trial the named representative lost his individual claim. While on appeal the Court of Appeals certified the class. This class certification at the appellate level is the only factual distinction from the case at hand. The Supreme Court reversed the decision "for the simple reason that it was evident by the time the case reached (the Court of

Appeals) that the named Plaintiffs were not proper class representatives under Federal Rule of Civil Procedure 23(a)," because they "were not members of the class of discriminatees they purported to represent." It is apparent in this case that Petitioner is not a proper class representative because she was determined to lack any injury in common with the putative class members. Her lack of nexus with or membership in the putative class is fatal to her claim of representation.

Petitioner complains of that portion of the Court of Appeals ruling in the present instance relating to a determination that Petitioner is not a proper class representative. She claims certiorari is proper due to an alleged conflict with the ruling of this Court in the *Geraghty* decision relating to a question of the existence of a case of controversy under Article III of the United States Constitution. The two cases are unrelated and therefore cannot be in conflict.

CONCLUSION

The Court of Appeals action in affirming the denial of class certification was proper. The Petition for Writ of Certiorari filed by Petitioner was not timely filed and therefore this Court is without jurisdiction to review the matter. Further, there are no circumstances giving rise to a review by this Court of the ruling of the Court of Appeals.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX "A"

PART V. JURISDICTION ON WRIT OF CERTIORARI

Rule 17. Considerations governing review on certiorari.

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2 The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

Rule 18. Certiorari to a federal court of appeals before judgment.

A petition for writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court. See 28 U. S. C. § 2101(e); see also, *United States v. Bankers Trust Co.*, [55 S. Ct. 407] 294 U. S. 240 [79 L. Ed. 885] (1935); *Railroad Retirement Board v. Alton R. Co.*, [55 S. Ct. 758] 295 U. S. 330 [79 L. Ed. 1468] (1935); *Rickert Rice Mills v. Fontenot*, [56 S. Ct. 374] 297 U. S. 110 [80 L. Ed. 513] (1936); *Carter v. Carter Coal Co.*, [56 S. Ct. 855] 298 U. S. 238 [80 L. Ed. 1160] (1936); *Ex parte Quirin*, [63 S. Ct. 1] 317 U. S. 1 [87 L. Ed. 3] (1942); *United States v. Mine Workers*, [67 S. Ct. 677] 330 U. S. 259 (1947); *Youngstown Sheet & Tube Co. v. Sawyer*, [72 S. Ct. 863] 343 U. S. 579 [96 L. Ed. 1153] (1952); *Wilson v. Girard*, [77 S. Ct. 1409] 354 U. S. 524 [1 L. Ed. 2d 1544] (1957); *United States v. Nixon*, [94 S. Ct. 3090] 418 U. S. 683 [41 L. Ed. 2d 1039] (1947).

Rule 19. Review on certiorari-how sought-parties.

.1 A party intending to file a petition for certiorari, prior to filing the case in this Court or at any time prior to action by this Court on the petition, may request the clerk of the court possessed of the record to certify it, or any part of it, and to provide for its transmission to this Court, but the filing of the record in this Court is not a requisite for docketing the petition. If the petitioner has not done so, the respondent may request such clerk to certify and transmit the record or any part of it. Thereafter, the Clerk of this Court or any party to the case may request that additional parts of the record be certified and transmitted to this Court. Copies of all requests for certification and transmission shall be sent to all parties to the proceeding. Such requests to certify the record prior to action by the Court on the petition for certiorari, however, should not be made as a matter of course but only when the record it deemed essential to a proper understanding of the case by this Court.

.2 When requested to certify and transmit the record, or any part of it, the clerk of the court possessed of the record shall number the documents to be certified and shall transmit with the record a numbered list of the documents, identifying each with reasonable definiteness. If the record, or stipulated portions thereof, has been printed for the use of the court below, such printed record plus the proceedings in the court below may be certified as the record unless one of the parties or the Clerk of this Court otherwise requests. The provisions of Rule 13.3 with respect to original papers shall apply to all cases sought to be reviewed on writ of certiorari.

.3 Counsel for the petitioner shall enter an appearance, pay the docket fee, and file, with proof of service as provided by Rule 28, 40 copies of a petition which shall comply in all respects with Rule 21. The case then will be placed on the docket. It shall be the duty of counsel for the petitioner to notify all respondents, on a form supplied by the Clerk, of the date of filing and of the docket number of the case. Such notice shall be served as required by Rule 28.

.4 Parties interested jointly, severally, or otherwise in a judgment may join in a petition for writ of certiorari therefrom; or any one or more of them may petition separately; or any two or more of them may join in a petition. When two or more cases are sought to be reviewed on certiorari to the same court and involve identical or closely related questions, it will suffice to file a single petition for writ of certiorari covering all the cases.

.5 Not more than 30 days after receipt of the petition for certiorari, counsel for a respondent wishing to file a cross-petition that would otherwise be untimely shall enter an appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 28, 40 copies of a cross-petition for certiorari, which shall comply in all respects with Rule 21. The cross-petition will then be placed on the docket subject, however, to the provisions of Rule 20.5. It shall be the duty of counsel for the cross-petitioner to

notify the cross-respondent on a form supplied by the Clerk of the date of docketing and of the docket number of the cross-petition. Such notice shall be served as required by Rule 28. A cross-petition for certiorari may not be joined with any other pleading. The Clerk shall not accept any pleadings so joined. The time for filing a cross-petition may not be extended.

.6 All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner shall notify the Clerk of this Court in writing of petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. A copy of such notice shall be served on all parties to the proceeding below and a party noted as no longer interested may remain a party hereby notifying the Clerk, with service on the other parties, that he has an interest in the petition. All parties other than petitioners shall be respondents, but any respondent who supports the position of a petitioner shall meet the time schedule for filing papers which is provided for that petitioner, except that any response by such respondent to the petition shall be filed within 20 days after receipt of the petition. The time for filing such response may not be extended.

Rule 20. Review on certiorari-time for petitioning.

.1 A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment. A justice of this Court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding 30 days.

.2 A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the Clerk within the time prescribed by law. See 28 U. S. C. § 2101 (e).

.3 The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

.4 The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

.5 A cross-petition for writ of certiorari shall be deemed in time when it is filed as provided in paragraphs .1, .2, and .4 of this Rule or in Rule 19.5. However, no cross-petition filed untimely except for the provision of Rule 19.5 shall be granted unless a timely petition for writ of certiorari of another party to the case is granted.

.6 An application for extension of time within which to file a petition for writ of certiorari must set out, as in a petition for certiorari (See Rule 21.1, subparagraphs (e) and (h)), the grounds on which the jurisdiction of this Court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion, and must set forth with specificity the reasons why the granting of an extension of time is thought justified. For the time and manner of presenting such an application, see Rules 29, 42, and 43. Such applications are not favored.

Rule 21. The petition for certiorari.

.1 The petition for writ of certiorari shall contain, in the order here indicated:

(a) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the

questions set forth in the petition or fairly included therein will be considered by the Court.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in this Court contains the names of all parties. This listing may be done in a footnote. See Rule 29.1.

(c) A table of contents and table of authorities, if required by Rule 33.5.

(d) A reference to the official and unofficial reports of any opinion delivered in the courts or administrative agency below.

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked showing:

(i) The date of the judgment or decree sought to be reviewed, and the time of its entry;

(ii) The date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to petition for certiorari; and

(iii) Where a cross-petition for writ of certiorari is filed under Rule 19.5, reliance upon that Rule shall be expressly noted and the cross-petition shall state the date of receipt of the petition for certiorari in connection with which the cross-petition is filed;

(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations which the case involves, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text then shall be set forth in the appendix referred to in subparagrph 1(k) of this Rule.

(g) A concise statement of the case containing the facts material to the consideration of the questions presented.

(h) If review of the judgment of a state court is sought, the statement of the case shall also specify the state in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g. ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari. Where the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(k) of this Rule.

(i) If review of the judgment of a federal court is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance.

(j) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 17.

(k) An appendix containing, in the following order:

(i) Copies of any opinions, orders, findings of fact, and conclusions of law, whether written or oral (if recorded and transcribed), delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed.

(ii) Copies of any other such opinions, orders, findings of fact, and conclusions of law rendered by courts or administrative agencies in the case,

and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each of these documents shall include the caption showing the name of the issuing court or agency and the title and number of the case, and the date of its entry.

(iii) A copy of the judgment or decree sought to be reviewed and any order on rehearing, including in each the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry of the judgment, decree or order on rehearing.

(iv) Any other appended materials.

If what is required by this paragraph or by subparagraphs 1(f) and (h) of this Rule, to be included in the petition is voluminous, it may, if more convenient, be separately presented.

.2 The petition for writ of certiorari shall be produced in conformity with Rule 33. The Clerk shall not accept any petition for writ of certiorari that does not comply with this Rule and Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46.

.3 All contentions in support of a petition for writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph 1(j) of this Rule. No separate brief in support of a petition for a writ of certiorari will be received, and the Clerk will refuse to file any petition for a writ of certiorari to which is annexed or appended any supporting brief.

.4 The petition for writ of certiorari shall be as short as possible, but may not exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations required by subparagraph 1(f) of this Rule, and the appendix.

.5 The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready

and adequate understanding of the points requiring consideration will be sufficient reason for denying his petition.

As amended Oct. 21, 1980, eff. Nov. 21, 1980.

Rule 22. Brief in opposition-reply-supplemental briefs.

.1 Respondent shall have 30 days (unless enlarged by the Court or a Justice thereof or by the Clerk pursuant to Rule 29.4) after receipt of a petition, within which to file 40 printed copies of an opposing brief disclosing any matter or ground why the cause should not be reviewed by this Court. See Rule 17. Such brief in opposition shall comply with Rule 33 and with the requirements of Rule 34 governing a respondent's brief, and shall be served as prescribed by Rule 28. The Clerk shall not accept a brief which does not comply with this Rule and with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46.

.2 A brief in opposition shall be as short as possible and may not, in any single case, exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations included in accordance with Rule 34.1(f), and any appendix. See Rule 28.1.

.3 No motion by a respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the Court to grant the writ of certiorari may be included in the brief in opposition.

.4 Upon the filing of a brief in opposition, or the expiration of the time allowed therefor, or express waiver of the right to file, the petition and brief, if any, will be distributed by the Clerk to the Court for its consideration. However, if a cross-petition for certiorari has been filed, distribution of both it and the petition for certiorari will be delayed until the filing of a brief in opposition by the cross-respondent, or the expiration of the time allowed therefor, or express waiver of the right to file.

.5 A reply brief addressed to arguments first raised in the brief in opposition may be filed by any petitioner

but distribution under paragraph .4 hereof will not be delayed pending the filing of any such brief. Such brief shall be as short as possible, but may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

.6 Any party may file a supplemental brief at any time while a petition for writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing. A supplemental brief, restricted to such new matter, may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed. As amended Oct. 21, 1980, eff. Nov. 21, 1980.

Rule 23. Disposition of petition for certiorari.

.1 After consideration of the papers distributed pursuant to Rule 22, the Court will enter an appropriate order. The order may be a summary disposition on the merits.

.2 Whenever a petition for writ of certiorari to review a decision of any court is granted, an order to that effect shall be entered, and the Clerk forthwith shall notify the court below and counsel of record. The case then will stand for briefing and oral argument. If the record has not previously been filed, the Clerk of this Court shall request the clerk of the court possessed of the record to certify it and transmit it to this Court. A formal writ shall not issue unless specially directed.

.3 Whenever a petition for writ of certiorari to review a decision of any court is denied, an order to that effect will be entered and the Clerk forthwith will notify the court below and counsel of record. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice thereof.